



Overview of the Makah Indian Tribe's Waiver Request

On February 14, 2005, the National Oceanic and Atmospheric Administration's (NOAA's) National Marine Fisheries Service (NMFS) received the Makah Indian Tribe's request for a limited waiver of the Marine Mammal Protection Act (MMPA), 16 U.S.C. 1361 *et seq.*, take moratorium under Section 101(a)(3)(A) (16 U.S.C. 1371(a)(3)(A)), including issuance of regulations and any necessary permits.¹ The waiver, regulations, and permit would allow the Tribe to continue treaty right subsistence hunting of eastern North Pacific (ENP) gray whales. The Tribe made the request following the Ninth Circuit's ruling in *Anderson v. Evans*, 371 F.3d 475, that the Tribe must comply with the process prescribed in the MMPA for authorizing take of marine mammals. A summary of the waiver request follows.

The Makah waiver request proposes to conduct Treaty ceremonial and subsistence harvest of up to 20 gray whales from the ENP stock in any five-year period with a maximum of five whales per year, corresponding with aboriginal harvest subsistence quotas granted to the United States by the International Whaling Commission (IWC) and implemented domestically by NMFS through the Whaling Convention Act, 16 U.S.C. 916 *et seq.*, and occurring in usual and accustomed hunting grounds. These numbers contemplate actual kills and landings under the IWC's definition of "take," which means to flag, buoy, or make fast to a whale catcher, as distinguished from the broader MMPA definition of "take," which means to harass, hunt, capture, or kill any marine mammal (16 U.S.C. 1362(13)). In addition, the waiver request states that Tribal regulations would limit the number of gray whales that may be struck ("strike" as defined by the Makah waiver request means any blow or blows delivered to a whale by a harpoon, rifle, or other weapon which may result in death to a whale, including harpoon blows if the harpoon is embedded in the whale, and rifle shots that hit a whale) to no more than seven in any calendar year. The waiver request states that the Tribe's regulations would limit the number of struck and lost whales to no more than three in any calendar year.

In addition, the waiver request proposes that the Tribal regulations would:

- Prohibit the taking of any other species of whale except ENP gray whales;

¹ The total request package consisted of 1) transmittal letter dated February 11, 2005, 2) Resolution No. 17-05 of the Makah Tribal Council, 3) application for a waiver of the MMPA take moratorium, 4) Appendix A - Needs Statement (Renker 2002), and 5) Appendix B (Treaty of Neah Bay). These materials are posted online at <http://www.nwr.noaa.gov> under the "gray whale" link, and were available subsequent to publication of the March 3, 2005 Notice of Availability at <http://www.nmfs.noaa.gov/pr>. These materials are public filings developed by Makah Tribe, and are not intended to represent NOAA's views. Similarly, this summary is meant to support the announcement of public filing information already distributed, and is not intended to represent NOAA's views.

- Prohibit the striking of a whale calf, or any whale accompanied by a calf;
- Prohibit the striking of an ENP gray whale between June 1 and November 30 of any calendar year to avoid intentional harvest of whales that may be part of the Pacific Coast Feeding Aggregation (PCFA);
- Prohibit the striking of ENP gray whales outside of the Tribe's usual and accustomed grounds as adjudicated in *United States v. Washington*, 626 F.Supp. 1405 (W.D. Wash. 1985) and within the Strait of Juan de Fuca;
- Reduce numbers of takes and strikes if necessary to meet the international treaty obligations of the United States under the International Convention for the Regulation of Whaling (ICRW);
- Provide for detailed photographic monitoring of all landed whales, ceasing hunting in a calendar year when photographic analysis indicates that suspension of the hunt is necessary to prevent the number of harvested whales from the PCFA catalog from exceeding an annual allowable bycatch level (or ABL, defined in the waiver request as the number of whales from the PCFA that may be taken incidental to a hunt directed at the migratory portion of the ENP stock of gray whales. The ABL is calculated using the MMPA's Potential Biological Removal (PBR) approach but the minimum population estimate is calculated from the number of previously seen whales in the Oregon-Southern Vancouver Island (OSVRI) survey area);
- Include measures that will ensure that the hunt is conducted in the most humane manner practicable consistent with the Tribe's goal of ceremonial and subsistence hunting, consisting of harpooning with a toggle point harpoon with a float attached before dispatching whales with a .50 caliber rifle shot;
- Prohibit the hunting or striking of whales within 200 yards of Tatoosh Island or White Rock during the month of May to minimize impacts to nesting seabirds;
- Regulate the hunt to ensure that public safety is at least as protective as provided for in the Tribe's 2001 Gray Whale Management Plan;
- Restrict the use of whale products to local consumption and ceremonial purposes in accordance with Section 102(f) (16 U.S.C. 1372(f)) of the MMPA. No whale products would be sold or offered for sale, except for traditional handicrafts made from non-edible whale products;
- Provide that no Tribal member may engage in whaling except under the control of a whaling captain who is in possession of a valid whaling permit issued by the Makah Tribal Council, including training and certification of all members who would participate in whaling
- Provide accommodations for NOAA observers, monitoring and reporting all hunts, and requiring Tribal enforcement of Tribal regulations.